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Senate

Statement of Senator Dianne Feinstein

“Comprehensive Immigration Reform – The Orange Card Program”

Mrs. FEINSTEIN. Mr. President, I thank the distinguished Senator from New Mexico for his thoughtful comments on the bill. I have the privilege of serving as a member of the Energy Committee, of which he is chairman. It has been a pleasure for me to serve under his chairmanship. I thank him for those comments.

I come to the floor to discuss an amendment, SA 4087, which I filed this morning. It is entitled "To modify the Conditions Under Which Aliens Who Are Unlawfully Present in the United States Are Granted Legal Status." I ask unanimous consent that Senator Harkin be added as a cosponsor of the amendment.

I ask unanimous consent that letters of support for the amendment from the Congressional Hispanic Caucus and over 115 groups and organizations from around the country be printed in the Record.

Mr. President, I make these remarks as a 13 1/2-year member of the Senate Judiciary

Committee and the Immigration Subcommittee. I also come from a State which is very large in terms of immigrants, both legal and illegal, and a State which is a dynamic economic engine for our country. I strongly believe that any comprehensive immigration bill must address three issues: a strengthening of our borders so that they are safe, effective, strong; a limited guest worker program and an overhaul of the visa system; and most importantly, I believe, the creation of a pathway to earned legalization for the large number of people, estimated at between 10 and 12 million, who live today invisibly in our Nation and who have become a critical part of the American workplace and on whom employers depend to do work Americans will simply not do.

I respond to our analysis of the Hagel-Martinez amendment, and my remarks are in two parts. The first part will be to propose an alternative to Hagel-Martinez. The second part will be a critique on what I see are substantial flaws in the Hagel-Martinez amendment.

I first thank both Senators Hagel and Martinez. They have done a great service to the Senate and our country by trying to come up with a compromise solution to what is a major problem facing our Nation. Nonetheless, I find significant structural and practical faults and have tried to correct those with the proposal I have just introduced and will be speaking on now.

I am introducing what is called an orange card amendment. This amendment would streamline the process for earned legalization. It would create a more workable and practical program and dedicate the necessary dollars to cover its costs of administration. This amendment builds on the compromises already agreed to under McCain-Kennedy and Hagel-Martinez, and it incorporates the amendments already adopted on the Senate floor. But it eliminates what I see as an unworkable three-tiered program under Hagel-Martinez.

This amendment only deals with earned legalization. It does not change any of the

border security provisions, the guest worker program, or any other part of this bill. Therefore, this amendment would essentially eliminate the program created by Hagel-Martinez and replace it with the orange card program I am now going to explain.

Under this amendment, all undocumented aliens who are in the United States as of January 1, 2006, would immediately register a preliminary application with the Department of Homeland Security. At the time of the registration, they would also submit fingerprints at the U.S. Customs and Immigration Service's facility so that criminal and national security background checks could commence immediately. That is the first step. It would also create a more precise registration system that would allow the immediate inflow of information into the Department of Homeland Security to be processed electronically, which the Hagel-Martinez amendment does not, and which is what we have been told is essential to ensuring that DHS can handle this new workload. It would give the Department time to vet the application through a thorough and orderly process. This would be the first step.

Under the second step, petitioners would submit a full application for an orange card in person by providing the necessary documents to demonstrate their work history and their presence in the United States. Their application would also require that they pass a criminal and national security background check that would be

carried out based on the information and fingerprints from the preapplication; they demonstrate an understanding of English and U.S. history and Government, as required when someone applies for their citizenship; they have paid their back taxes; and they would pay a \$2,000 fine. The money from this fine would be used to cover the costs of administering the program. These requirements are the second step of what is required to earn an orange card. They also comply with previous amendments passed on the floor of the Senate during this debate.

If the application is approved, each individual would be issued what I call an orange card. I selected orange because the color had no connotation I could think of. This card would be encrypted with a machine-readable electronic identification strip that is unique to that individual. The card itself would contain biometric identifiers, anti-counterfeiting security features, and an assigned number that would place that individual at the end of the current line to apply for a green card. The number would correspond to the length of time that the petitioner has been in the United States so that those who have been here the longest would be the first to follow those currently waiting to receive a green card. That is the 3.3 million people outside of the country awaiting a green card.

These cards would go in order following the expunging of that line.

The issuance of an orange card would allow individuals to remain in the United States legally and work, as well as travel in and out of the country. It would become their fraud-proof identifier, complete with a photo and fingerprints. This is the second step to earning legalization.

The third step is that on an annual basis, each individual who applies for an orange card would submit to DHS documentation either electronically or by mail that shows what they have been doing in that year, the work they have carried out, that they have, in fact, paid their taxes that year, and whether they have been convicted of any crime during that year, either through court documents or an attestation, and they would pay a \$50 processing fee. These three steps, plus the required wait at the back of the green card line, clearly indicates that this is not an amnesty program.

The legalization in the orange card must be earned, and it must be earned over a substantial period of time. It would be available to all who are here from January of this year.

This language will ensure that there are enough funds to run the program because there is a \$2,000 fine that would be dedicated to paying for the administration of the program and a \$50 annual processing fee. For example, assuming there are between 10 and 20 million undocumented aliens already in the United States who would have to pay a

\$2,000 fine, if 10 million came forward, that alone would raise \$20 billion. So the program would be covered. By including this language, this amendment protects against creating a new burden on taxpayers and ensures that the Federal Government has the necessary money to make the program work.

Another safeguard contained in the amendment is the annual reporting requirement. By including this process, this amendment will ensure that individuals who apply to this program remain productive and hard-working members of their communities. The amendment requires that individuals must work for at least 6 years before they may adjust their status. Realistically, from what we know about the number of green card petitioners legally waiting in other countries for their green card, it is much more likely that they would have to wait a longer time before the process is completed. Again, this is not amnesty. It is a clear path to an earned legalization. These prospective reporting requirements ensure that only individuals who deserve to adjust their status and continue to be productive members of their communities may become legal permanent residents.

In addition, by focusing on prospective requirements, this amendment streamlines the process and helps avoid the bureaucratic morass that has been created other times when Congress has acted. If we don't get this right, we will end up repeating mistakes of the past.

We will simply create new incentives for illegal immigration, and we will enhance the problems our country now faces in tracking who is coming and going across our borders.

Remember, it is estimated that about one-third of those who receive visas do not leave the United States when their visas expire. So the problem is not only people coming across the border; the problem is also people misusing their visas. In 2004, there were just over 30 million visas issued. That is an unbelievable amount, but it is true. That means there could be up to 10 million people who overstayed their visas and remained in the United States. Now, of course, most of them probably didn't stay here permanently. But it is clear from these statistics that our visa program has a serious problem when it comes to enforceability.

I strongly believe we must find an orderly way to allow those already here, many of whom have families, strong community ties, and some who have U.S. citizen children, to earn legalization over a substantial period of time. And virtually every poll I have seen has shown that over 70 percent of the American people agree. They know there are many people who are critical parts of our workforce. They work in agriculture, in landscaping, in housing, in the service industry, in the hotel industry, and they work all throughout our economy. I know some who not only have children, but their children are excelling. They not

only live here, but they own homes, pay taxes, and they work hard. This is important so that this population can live fully productive lives without being subject to abuse or exploitation, and so that American commerce has the workforce that is necessary for agriculture, as well as many other industries.

During consideration of this bill in the Judiciary Committee, of which you are a distinguished member, Mr. President, we adopted an amendment referred to as the McCain-Kennedy program that was offered by Senator Graham. This amendment created an earned legalization program that would also set up a number of hurdles individuals must pass through in order to earn their legalization. The Graham amendment was adopted by a bipartisan vote of 12 to 5 and was in the base bill previously considered by the Senate.

However, since that time, a new program was created and replaced McCain-Kennedy in the underlying bill. That program is known as the Hagel-Martinez compromise. It is important to point out that neither this body nor the Judiciary Committee has voted to adopt the three-tiered system which the Hagel-Martinez compromise proposes and which is now before this body.

Hagel-Martinez would treat people differently, depending on how long they have been in the United States. It is estimated that 6.7 million have been in the United States for more than 5 years; 1.6 million,

less than 2 years; and 2.8 million, 2 to 5 years. The source of the numbers is the Pew Current Population Survey. So we have three tiers -- more than 5 years, 2 to 5 years, and less than 2 years.

After an examination of the Hagel-Martinez language, I have come to believe that the three-tiered system is unworkable, that it would create a bureaucratic nightmare and it would lead to substantial fraud. My staff has consulted with current and former Government staff who have expressed serious concerns with the practical implications of how such a program could be implemented.

We already know the Department of Homeland Security is overburdened. Just for a moment, look at the problems they face today. Our current system is running neither efficiently nor effectively, and we all know that. Let me just put on the table a few examples.

Currently, the Department of Homeland Security is struggling to implement a fully functioning US-VISIT Program to monitor those who are entering and exiting our country. This system of checking people in and out with a biometric card is only half completed. It is many years overdue.

The Bureau of Citizenship and Immigration Services struggles with enormous backlogs in applications from those who come to this country and attempt to adjust their status

legally. FBI background checks often take between 1 or 2 years to process fingerprints. Naturalization lines are so long, it can take a person years and sometimes even decades to get through the system. How on Earth is DHS going to be able to handle a new program which cannot be run electronically and which will require massive documentation and enormous staff time?

What we have done is provided a structure for an electronic handling of the data submitted by the individuals, the electronic verification of the data, the checking out of this data. Hagel-Martinez creates a tiered system where those here less than 2 years are subject to deportation and those here from 2 to 5 years must return to their country and get themselves somehow into a guest worker program. It is estimated that 1.6 million people have been here for 2 years or less, and approximately 2.8 million have been here from 2 to 5 years. So that is 4.4 million people who are going to be asked to leave the country one way or another. Do you believe they will? History and reality shows that they will not. How will the Government find all of them and deport those who do not leave voluntarily? And if they are found and deported, what would lead us to believe they will not come right back to join their families and return to their jobs?

Secondly, individuals who have been here just under 2 or 5 years will inevitably try to argue they qualify for a higher tier. I think it is only realistic to

expect that these tiers will become a breeding ground for flawed, fraudulent documents, and true evaluations will be virtually impossible to make. How on Earth are DHS personnel going to be able to verify when an individual entered the country to determine the less than 2 years or the 2- to 5-year tier?

When it comes to the second tier, 2 to 5 years, and the deferred mandatory departure program of Hagel-Martinez, I am concerned about how this process is going to function and who is going to follow through with executing its requirements. How is the Department of Homeland Security going to find these people who have been here 2 to 5 years and ensure that they actually leave the United States? Does anyone really expect that a father or a mother will voluntarily leave their families and go outside the country for this so-called touchback? What is the incentive for people who have already been living in the United States to come forward and go through this process?

In order to understand why I have these questions, I think it is important for everyone to understand how the deferred mandatory departure program of Hagel-Martinez is supposed to work. There has been a lot of discussion about the program, but when you read the fine print of the bill language, there are serious questions and consequences that need to be better understood.

My understanding of the bill language is that a person who

falls into this second tier, who has been here for 2 to 5 years, may remain in the United States legally for up to 3 years and then they must leave the country and find a legal program through which they may reenter the United States. This is the critical flaw in Hagel-Martinez. People will not risk leaving their families or their jobs in the hopes that once they leave the United States they will be able to reenter through a visa program, whether that be the new H-2C guest worker program or another visa program.

To compound this problem but ostensibly to make it possible, Hagel-Martinez waives the 200,000 visa cap that we just reduced from 325,000 in the Bingaman-Feinstein amendment on the H-2C program. In doing that, this would create a larger bureaucratic hurdle, a difficult standard of proof, and a complete decimation of the limits on the guest worker program. Instead of a new guest worker program -- H-2C -- that will bring in 200,000 people a year, we would be, in effect, creating a guest worker program that is supposed to accommodate 2.8 million people, plus another 200,000 people annually. So through this deferred mandatory departure, the Congress creates a guest worker program that will need to accommodate over 3 million people.

But putting all that aside, assuming this was actually doable, there are other problems. For instance, the H-2C guest worker visa only lasts

a maximum of 6 years. So every person will quickly see that this is not an automatic path to earn their legalization, and they will be forced out of the country at the end of the 6 years. Will they go? I doubt it. I think you will have a new illegal immigrant problem.

The path to legalization has been modified through the amendment process on this floor, and now an H-2C worker will likely need their employer to petition for a green card on their behalf. A employer has to petition for it, meaning that, for 2 million people, their only hope to continue to live in the United States is through the grace of an employer. I think this places an undue burden on an employer, and it leaves workers vulnerable to exploitation from bad employers.

Also, H-2C workers, their spouses, and their children are not allowed to remain in the United States if the worker fails to work for an approved employer for more than 60 consecutive at any time during the 6 years, with no exception for health problems or injuries. This will mean that if an individual does become injured or ill, they become deportable. In addition, all rights to administrative or judicial review of any future removal actions, are eliminated. Combined, in my view, these provisions are ill-advised. They make individuals extremely vulnerable to abuse, they put high burdens on employers, and they open the situation up to exploitation.

That leaves me to wonder, with these shortcomings, why would anyone in these categories participate in this program?

Why would someone who is already living here clandestinely, working, and already active in their community voluntarily come forward and register with the Department of Homeland Security and leave the United States to join this program? With these risks and pitfalls, my experience in California and my 13 1/2 years on the Immigration Subcommittee tells me they won't. At worst, I fear we are creating an incentive for individuals to continue living under an illegal status, and I don't know how that benefits this Nation, the people of our Nation, the employers, or the people who are here today in an undocumented status. At best, we are creating a new burden on DHS to locate and monitor millions of people who are clandestinely integrated into the fabric of our Nation today.

In addition, the Hispanic National Bar Association specifically criticized this second tier, and it wrote this:

"We are particularly concerned that requiring individuals in the [second tier] to leave this country in order to fully legalize their status will result in severe disruptions for families, workers, and employers...We [also] believe that creating an additional class of undocumented immigrants will lead to greater administrative burdens as it will require the implementation of

two different paths to legalization.”

I think that is a very true statement.

Let me speak about the third tier for those who have been here for less than 2 years because according to Hagel-Martinez, they must all be deported. This means that DHS would be required to find and deport 2 million people. That is the bill we are going to pass -- 2 million, find them, deport them. How is that going to get done? Even President Bush acknowledged that such a large-scale deportation program is unworkable when he said this:

It is neither wise nor realistic to round up millions of people and send them across the border.

The only method to compel compliance with Hagel-Martinez is through employer sanctions, and we know from experience over dozens of years that employer sanctions do not work.

In fiscal year 2004, only 46 employers were convicted of illegal immigrant employment - - 46 employers -- out of the tens of thousands of employers whom we know employ the undocumented, and the number of employer sanctions cases resulting in fines has declined from a peak of nearly 900 under President Clinton to only 124 in fiscal year 2003. Not to mention even when employers are raided and then sanctioned, there is a backlash from the public.

So I am one who doesn't believe it is realistic to assume that, first, the Department of Homeland Security is going to be able to go out and deport 2 million people; and then secondly, to ensure that the other 2.8 million leave to go back for the touchback program.

So because of these concerns about the workability, the practicality, and the real-world impact of such a three-tiered system, I believe we have to create a much more efficient process, and I believe the orange card process is the best way to ensure that our policy goals in creating a path to legalization can be implemented and realized.

The structural flaws of Hagel-Martinez must be corrected, and this amendment essentially corrects them. It is workable, it is practical, it does not reward illegal immigration, but it creates a pathway for everyone in this country as of the beginning of this year to show over a substantial period of time annually that they have been and will continue to be a responsible and productive member of American society. It puts the burden on them to go in, to petition, to submit their fingerprints, to submit their photographs, and to wait for those to be checked out before they would be issued the orange card.

Once you have this orange card then you know you are legal. You can come in and out. It has the biometric identifiers. It is fraudproof. And the orange card has the additional ability of

being numbered, so you also know that the lower numbers are going to people who have been here for the 10, 15, 20, 25, and 30 years that we know people, in fact, have been in this country. It is done in a way that can be carried out electronically, and I think that is part of the strength of the program.

Here we have a pathway that requires an individual to show over a substantial period of time that they have been and will continue to be a responsible and productive member of American society and to do so with certain tangible deeds: the tangible deed of work, the tangible deed of living a legal life, the tangible deed of paying back taxes, the tangible deed of learning to speak English. This is not amnesty. Nothing happens immediately. Amnesty is the immediate transition of someone from an illegal status to a legal status. If an individual cannot demonstrate these things, they will not receive a green card at the end of this long pathway, and then at that time they are deportable.

If a bipartisan majority agrees that an earned legalization program is a critical part of a comprehensive immigration reform bill, then the program must work on the streets and it must be carefully structured so that it can be carried out. I believe this program can be carried out, and I am sorry to say that as currently structured, I do not believe the three-tiered process of Hagel-Martinez can or will be carried out.

This is an amendment on which I hope we will vote. It is at the desk. I ask my colleagues to look at it, study it, and if they have modifications -- this is a complicated issue -- if they have modifications they would like to see, please bring these to us because we hope there will be a vote in the next couple of days.

I thank the Chair, and I yield the floor.